3-1700-8948-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Tracey Schelin,

Complainant,

v.

PGI Companies, Inc.,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on February 6, 7 and 8, 1995 at the Scott County Courthouse in Shakopee, Minnesota. The record closed on April 20, 1995, the date that Complainant's Reply Brief was filed.

Marcia S. Rowland, Attorney at Law, Standke, Greene & Greenstein, Ltd., 17717 Highway 7, Minnetonka, Minnesota 55345, appeared on behalf of the Complainant.

Karen A. Shamerlik, Attorney at Law, O'Neill, Burke, O'Neill, Leonard & O'Brien, 800 Norwest Center, 55 East Fifth Street, St. Paul, Minnesota 55101, appeared on behalf of the Respondent.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

Whether Respondent discriminated against Complainant in the terms and conditions of her employment because of sex and marital status in violation of Minn. Stat. § 363.03, subd. 1;

Whether Respondent's actions toward Complainant subsequent to her filing complaints of sexual harassment constitute unlawful reprisals in violation of Minn. Stat. § 363.03, subd. 7.

Whether Complainant is properly entitled to treble compensatory damages, damages for mental anguish and suffering, or punitive damages.

Whether a civil penalty is appropriate in this case.

Whether an award of attorney's fees and costs to Complainant and her attorney in appropriate in this case.

Whether it is appropriate to award pre-judgment interest in this case.

Whether it is appropriate to order reimbursement to the Department of Human Rights for litigation and hearing costs.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Tracey Schelin is a 29-year-old female who resides at 3856 Green Heights Trail S.W., Prior Lake, Minnesota. She is employed as a Bindery Supervisor at a commercial printing business, Advanced Duplicating and Printing, Inc. Before her current employment, she worked in the bindery section of another commercial printing business, PGI Companies, Inc. PGI Companies, Inc. terminated her employment on August 27, 1993.

2. PGI Companies, Inc. (hereinafter also referred to as "PGI") is a Minnesota corporation with its principal place of business at 11354 K-Tel Drive, Minnetonka, Minnesota. PGI is in the business of providing commercial printing services including, for example, advertising inserts used for mailing or in newspaper-type publications. PGI is owned by Mr. Jeffory Brower, its President, and Mr. Jim Ripka, its Vice-President, each having 50% ownership. The Company is successful. From a beginning in the early 1980s with less than 10 employees, it now employs approximately 350 people.

3. PGI's Vice-President, Jim Ripka, is responsible for the plant area and the plant personnel. Directly below Vice-President Jim Ripka is his brother, Joe Ripka, who is PGI's Plant Superintendent or Plant Manager.

4. Tracey Schelin began working full-time for PGI in October 1984 in its bindery section. Ms. Schelin became familiar with all the machines used in the bindery section; she learned how to clear jams and keep the machines operating. She was able to operate each machine, including the "burster", "file folders", "continuous folder" and the "cutter". Because of her experience and knowledge, she often helped other people in the bindery operate their machines.

5. Ms. Schelin's supervisors, including Plant Manager Joe Ripka, called Ms. Schelin "outstanding" and a "top performer" at PGI. She acquired the role of "Trainer" of new bindery employees. At the time of her termination, she had worked nearly ten years for PGI.

First Sexual Harassment Complaint

6. Beginning in August of 1992, co-workers of Ms. Schelin subjected her to crude, offensive and derogatory comments of a sexual nature.

7. She told her co-workers that the sexual comments were unappreciated. She asked them to stop.

8. The offensive and derogatory sexual comments were directed at Ms. Schelin personally. The co-workers primarily responsible for this offensive conduct were Dale Gueningsman, Darren Bushinger and Rich Sieverson.

9. Beginning in August 1992, Dale Gueningsman's conduct, with Rich Sieverson and Darren Bushinger encouraging him, included the following: calling Tracey Schelin sexually derogatory names, including cunt, pussy, beaver, tits, twat, dicks, dongs, balling bone; stating things such as, "Tracey got the big dong this morning because she smells like a cunt-filled twat"; and Dale Gueningsman pretending that he was Tracey calling in to say she will be late for work, and at the same time simulating rear entry sexual intercourse.

10. Ms. Schelin also received sexually motivated comments from other co-workers, particularly when she needed assistance to do her work such as moving heavy paper stocks. For example, Mike Niedenfuer, a salesman, told Tracey Schelin, she would get help from him if she wore a bikini to work. Another co-worker, Darren Bushinger, told Tracey Schelin that she should present herself as "something to look at" by wearing her hair up and curled and should wear high-heeled shoes and shorts.

11. The offensive conduct occurred at any time, but most often occurred in the mornings when the Bindery Supervisor (Kathy Flood-Bergeson) was away. Co-workers would sometimes shut down their machines while this offensive activity was going on; co-workers not directly making the offensive comments would participate by laughing and urging on Dale Gueningsman.

12. The offensive conduct by co-workers created a difficult and uncomfortable work situation for Ms. Schelin. She desired to come to work, do her job but did not desire to listen to the offensive sexual commentary. However, because she thought it was important to get along with her co-workers, she tried to handle the uncomfortable work situation by herself by telling her co-workers to knock it off or just ignoring it.

13. Ms. Schelin complained about the sexually derogatory comments to the Plant Superintendent, Joe Ripka, in September of 1992. She told Joe Ripka to ask Shannon Dummer about the sexual comments. Mr. Joe Ripka talked with Shannon Dummer who told him that she had witnessed the derogatory and offensive comments from Dale Gueningsman and Rich Sieverson. She also indicated that she did not like working in that environment either. After conferring with Vice President Jim Ripka, Mr. Joe Ripka met with Dale Gueningsman and Rich Sieverson and told them both to "knock it off or in the future I will have to write you up".

14. After Ms. Schelin's complaint to Joe Ripka, the offensive conduct continued. At no time did Mr. Joe Ripka give any indication to Ms. Schelin that he would do anything to stop the offensive conduct from occurring. Ms. Schelin was devastated by the sexual comments, she felt worthless, humiliated and degraded.

15. PGI did not have a sexual harassment policy at the time of Ms. Schelin's first complaint. Neither Jim RIpka nor Joe Ripka returned to either Ms. Shannon Dummer or Ms. Schelin to determine whether or not the derogatory sexual comments were continuing.

Second Sexual Harassment Complaint

16. In late December, 1992, Tracey Schelin complained to PGI's President, Jeffory Brower about the offensive verbal conduct of her co-workers. She told Mr. Brower "about everything that was going on", including the sexually derogatory comments directed at her and identifying the people that were doing it. Jeffory Brower did not ask for detail regarding the offensive conduct, he said that he thought the comments were inappropriate and said that another employee had already made a complaint against Mike Niedenfuer.

17. The day following her complaint to PGI President Brower, many of the employees in the plant knew about her complaint, including Dale Gueningsman. Although Tracey Schelin tried to avoid him, Dale Gueningsman came up to her and said, "I heard you told on me, if you ever get me fired for sexual harassment, I'll kill you." Dale Gueningsman repeated this threat to her several times. Tracey Schelin was upset and believed that Dale Gueningsman meant what he said; she took the threat seriously. She reported the threat to PGI President Jeff Brower, who indicated that he didn't believe that Dale meant it. He did not think that Dale Gueningsman was serious. Tracey Schelin was upset and crying during this meeting. He informed her at that time that there was going to be a company-wide meeting in January to deal with sexual harassment and that everything would be taken care of.

18. During the first week of January, 1993, Mr. Brower contacted an attorney who advised him on how PGI should handle Tracey Schelin's sexual harassment complaints. In a letter dated January 7, 1993, Mr. Brower was advised by an attorney that an investigation should be conducted and completed quickly within a week or two weeks; that Ms. Schelin should be informed that retaliation against her for making a complaint of sexual harassment was unlawful and that PGI should monitor the parties reaction to the complaint in order to avoid retaliatory conduct or future harassment. Ex. 37.

19. Based on his attorney's advice, Mr. Brower knew that retaliatory comments such as those made by Dale Gueningsman were unlawful. Mr. Brower also knew that PGI should monitor Ms. Schelin's working environment and her co-workers' reactions to the complaint. Mr. Brower made no follow-up to protect Ms. Schelin or to determine whether the offensive conduct was continuing.

20. Based upon the advice received from the attorney, Mr. Brower designated two employees to investigate the complaints, Jeffery Woll, manager of PGI Mailers, and Diane Nielson, a recently hired employee in PGI's Accounting Department. Mr. Woll and Ms. Nielson conducted interviews of Tracey Schelin on January 14, 1993; Shannon Dummer on January 15, 1993; and Dale Gueningsman and Rich Sieverson on January 22, 1993. Exs. 20, 21, 22 and 23.

21. Ms. Schelin reported to the interviewers that she began to get sexually derogatory comments from Dale Gueningsman and Rich Sieverson in the fall of 1992. She told the interviewers that she reported the sexual derogatory comments to Joe Ripka but after her complaint to Joe Ripka the verbal abuse continued from Dale Gueningsman. Rich Sieverson discontinued direct offensive behavior but was still an audience to Dale Gueningsman. However, Rich has been transferred to the presses so he was not around as much. She told the reporters the sexually explicit language that Dale Gueningsman used and the derogatory terms that he used when referring to her. She told the interviewers that she felt insulted and degraded and that it made her think "am I a bad person". Ms. Schelin reported that Dale Gueningsman had threatened her after she made the report to Mr. Brower. Diane Nielson described Ms. Schelin's comments in this way, "Tuesday - he (Dale Gueningsman) cornered her and said you know people get fired for this". Ex. 23. Ms. Schelin reported that she deals with Dale Gueningsman's behavior by telling him to shut up, or tells him that's enough, walks away, tries not to encourage although sometimes ignoring makes it worse. Ex. 23.

22. Based on their interviews of Tracey Schelin, Ms. Dummer, Mr. Sieverson and Mr. Gueningsman, the investigators concluded that sexual derogatory comments had been directed at Ms. Schelin. They reported this conclusion to Mr. Brower.

23. On February 2, 1993, after the investigation into Ms. Schelin's sexual harassment complaint, PGI took the following personnel actions:

Dale Gueningsman received a written reprimand;

Rich Sieverson received a verbal warning;

Darren Bushinger received a verbal warning; and

Mike Niedenfuer received no adverse personnel action. Exs. 6, 38.

24. PGI's management did not inform Tracey Schelin of the outcome of the investigation and did not inform her of any actions taken as a result of the investigation. No one from PGI's management informed Tracey Schelin what she should do if the sexual harassment continued. From the end of December when Tracey Schelin reported the sexual harassment to PGI's President, the sexually derogatory language continued to be used around Tracey Schelin loud enough so that she could clearly hear it but was not directly directed at her.

Third Sexual Harassment Complaint

25. On April 7, 1993, Shane Anderson, a married pressman, walked over to Tracey Schelin while she was working on a folding machine and gave her a letter. The letter ended with: "Will you have sex with me?" She immediately gave the letter to Kathy Flood-Bergeson, who gave the letter to PGI President, Jeff Brower.

26. One week later on April 14, Tracey Schelin had a short meeting with Mr. Brower and Jeff Woll. They told her that they would take care of it and talk to Shane Anderson. On April 16, 1993, Shane Anderson was given a written reprimand. Ex. 7.

27. After Ms. Schelin reported Shane Anderson's letter, PGI management did not get back to her to discuss the matter. No one officially informed her about the

resolution of the incident or told her what to do if such harassment continued. She later heard unofficially that Shane Anderson had been "written up".

28. On April 14, 1993, PGI circulated a memo to its employees announcing a meeting on April 21, 1993 about PGI's new sexual harassment policy. Ex. 5. On the day the memo was distributed, Joe Ripka, Plant Superintendent, while handing out the memo to Ron Schliesman, stated that, "Some women deserve to be harassed".

29. On April 21, 1993, PGI first distributed a sexual harassment policy, which it backdated to January 1, 1993. PGI does assert in its Answers to Interrogatories (Ex. 36) that PGI's sexual harassment policy had been effective since January 1, 1993. However, as indicated in Exhibit 37, PGI's attorney had not provided a draft sexual harassment policy until sometime after January 7, 1993. Regardless of the date on the sexual harassment policy, the policy was not formally announced to PGI employees until April 21, 1993.

30. To accommodate all of its employees, the company-wide sexual harassment meeting was held in four sessions, each lasting approximately one-half hour. At each meeting, the company policy was announced and examples of conduct considered offensive were described by PGI's attorney. After the meeting attended by Ms. Schelin, employees made jokes about the sexual harassment policy.

31. Vice-President Jim Ripka believed that handling sexual harassment claims meant putting procedures in place to protect the Company from liability. President Jeffory Brower volunteered that he made certain that when Ms. Schelin or any other woman came to his office, windows and doors were open so that he, himself, would not be accused of sexual harassment.

32. At no time did PGI management, Jeffory Brower, Jim Ripka or Joe Ripka follow up on Ms. Schelin's complaints to ascertain the condition of her work environment. After her complaint to Joe Ripka in September, Joe Ripka never spoke to her about whether the offensive conduct was continuing. After her several complaints to President Jeffory Brower in December and January, he never followed up to determine whether or not the offensive conduct was continuing.

33. One day in April 1993, when Mr. Brower was walking through the plant, he stopped by her machine and asked Ms. Schelin how it was going. She responded, "OK". This brief conversation occurred within view of the other bindery section employees.

34. PGI President Jeffrey Brower discovered that the person responsible for communicating Ms. Schelin's complaint to other workers at the plant was a receptionist who worked outside of Mr. Brower's conference room where he met with Ms. Schelin. The receptionist was scheduled to be transferred to a confidential position in accounting. Mr. Brower concluded that the person was not suitable for the confidential position in accounting because of her communicating the private conversation to other employees. He concluded that she was not suitable for the confidential position in accounting and therefore terminated her.

<u>Reprisals</u>

35. From the point that Tracey Schelin reported the offensive harassment to PGI's President, Jeff Brower, and continuing through the termination of her employment, fellow employees made numerous comments to her, such as: "Tracey is a narc", or "Tracey will tell on us". The sexually derogatory language continued after the warnings were issued by PGI, but if Ms. Schelin was present the co-workers would say (loud enough for Ms. Schelin to hear), "Be quiet, she's going to tell on you", or "The tattletale is here". Her co-workers called her "bitch" and "narc". She was treated as an outsider, shunned and ostracized, isolated from co-workers. This working environment was devastating to Ms. Schelin. She prided herself as being a person who could get along with anyone. She was "uncomfortable" at work because she felt like she was a bad person causing her co-workers to treat her in this offensive manner.

36. In June of 1989, Tracey Schelin married Robert ("Bobby") Ripka. They were divorced in September of 1991. Bobby Ripka is the nephew of PGI Vice-President Jim Ripka and PGI Plant Superintendent Joe Ripka.

37. As a part of their divorce settlement, Bobby Ripka was required to pay a lump sum settlement. In order to make that payment Bobby Ripka borrowed the money from Vice-President Jim Ripka. After the divorce, Vice-President Jim Ripka was cold and negative toward her and stated that, "Bobby got screwed over", by having to give her that payment.

38. In May 1993, Ms. Schelin began dating a co-worker, a pressman named Ron Schliesman. Near the end of May, it became known that she was dating Ron Schliesman.

39. When it became known that Tracey Schelin was dating Ron Schliesman, Shop Superintendent Joe Ripka, in conference with Jim Ripka, began making special rules that only applied to Tracey Schelin, and no other PGI employee.

40. The "rules" which only applied to Tracey Schelin included:

a) Tracey Schelin was not to be in the PGI building or anywhere on PGI premises, including its parking lot, unless she was working. This "rule" was to prevent Tracey Schelin from meeting Ron Schliesman after work by waiting for him in the parking lot.

b) Tracy Schelin was not to eat lunch or take breaks with Pressman Ron Schliesman. Other employees, including others who were dating, were allowed to eat lunch and take breaks together.

41. Ron Schliesman worked the second shift (3:00 p.m. to 11:00 p.m.) while Tracey Schelin worked the first shift (7:00 a.m. to 3:00 p.m.).

42. Joe Ripka viewed Tracey Schelin as a liability to the Company and communicated that to certain employees. He encouraged those employees to make reports about Tracey Schelin. He told them to "watch her". He acted on co-worker reports without testing their credibility or giving Ms. Schelin an opportunity to respond.

43. During early June of 1993, Shop Superintendent Joe Ripka told Tracey Schelin that he didn't like her stirring up trouble and said that he was going to fire her.

44. In response to hearing this, Tracey Schelin asked Mr. Brower to see her personnel file, telling him that she had received a threat of being terminated. She wanted to see what, if anything, she had done wrong.

45. PGI President Jeffory Bower refused to allow Ms. Schelin to see her personnel file and did not tell her that PGI would let her see her file if she made a request for the file in writing.

46. In June of 1993, PGI promoted Dale Gueningsman to be Bindery Supervisor on the first shift (Tracey worked the first shift in the bindery) and also as supervisor over all of the bindery shifts. Dale Gueningsman was the PGI co-worker who had sexually harassed Tracey Schelin and had threatened to kill Tracey Schelin if she got him fired because he had sexually harassed her. The promotion caused Dale Gueningsman to become Tracey Schelin's immediate supervisor and supervisor over all the bindery shifts, including the subsequent second shift supervisor.

47. On or about June 21, 1993, after her performance appraisal had been completed, Dale Gueningsman told Ms. Schelin, "I know this is not even related, but Jim Ripka wants me to tell you this. If you continue to have lunch with Ron or see him after 3:00 p.m., you will be fired." No work-related concerns were expressed. She was simply not to see Ron Schliesman.

48. Other co-workers openly dated, had lunch and took breaks together. They were not told they had to stop having lunch or breaks together. The couples would also talk to each other during their work shifts.

49. In June or July of 1993, Ms. Schelin decided that she wanted to continue her education, focusing on a career that would complement the knowledge she had gained in the commercial printing business. She decided to attend Brown Institute to take courses on advertising graphics and design. On August 9, 1993, Tracey Schelin moved at her request to the second shift so that she could attend school at the Brown Institute and still work full-time.

50. After her transfer to the second shift, on August 9, 1993, Ms. Schelin was supervised by Marnie Simpson, a person who had considerably less experience than Tracey Schelin. Ms. Simpson had "no problems" with Ms. Schelin during the first week. Ms. Schelin helped Ms. Simpson keep her machine operating. Ms. Simpson was out sick the entire second week that Ms. Schelin was on the second shift.

51. During that second week, Joe Ripka asked two recently hired bindery employees to "watch" Ms. Schelin. These employees reported to Joe Ripka on Thursday or Friday that Ms. Schelin spent too much time speaking to Ron Schliesman, that she cooked and ate popcorn and that she refused to work upon returning from lunch until she finished an ice cream treat. After the employees repeated this report to Jim Ripka, Jim and Joe Ripka decided on Thursday or Friday that Ms. Schelin should be terminated.

52. Ms. Schelin was not given an opportunity to respond to these reports even though the complaints contained inaccuracies. An example of an inaccuracy in the

reports is observed in the written statements of Mike Niedenfuer (Exhibit 33) compared to the statement of Audrey Bromwell (Exhibit 32). Audrey Bromwell's statement said that Mike Niedenfuer had to come into the bindery and told Ron Schliesman to "get the hell out of there". However, Mike Niedenfuer's statement says that he looked into the bindery area and Ron Schliesman was walking back to his press so Mike Niedenfuer just went back upstairs. PGI had both statements and knew or should have known that one of the employees was lying.

53. Even if the reports by employees who were watching Ms. Schelin were true, Ms. Schelin has not violated a work rule; other employees made and ate popcorn on the PGI premises during their shifts, other employees talked with each other while at work.

54. PGI responded to the "reports" of employees who "watched" Ms. Schelin much faster than it did to any of Ms. Schelin's sexual harassment complaints.

55. PGI elected not to use the Company's progressive discipline policy when it summarily terminated Ms. Schelin.

56. Ms. Schelin was summarily terminated for what appears at the very best to be minor infractions; she was not given discipline such as a verbal warning or a written warning as had been given to those co-workers who harassed her.

57. Ms. Schelin worked less than three weeks on the second shift. She was terminated on Wednesday or Thursday of the third week (effective Friday, August 27, 1993).

58. On the day that Tracey Schelin was fired, she came in to work, and could not find her time card. Dale Gueningsman told her that Jim Ripka wanted to see her. She went in to Jim Ripka's office. Jim Ripka handed her her final checks and told her that she was finished working for PGI. She asked Jim Ripka twice why she was being terminated. Jim Ripka refused to tell her why she was being terminated.

59. According to Tracey Schelin's written performance evaluations dated July 1992, December 21, 1992 and June 21, 1993, Ms. Schelin's job performance was very good during her last year at PGI. Exs. 3 and 4. Review of these performance appraisals shows that Ms. Schelin was consistently considered "good" or "excellent". In the December 21, 1992 appraisal, she received six good ratings (all 4 on a scale of 5) and received a 50-cent-per-hour merit and length-of-service pay increase. In the June 21, 1993 performance appraisal, Tracey Schelin received one satisfactory (3 on a scale of 5), one excellent (5 on a scale of 5) and four good ratings. PGI's performance appraisal included the following written notations: "One of top producers". "Takes and follows directions very well." "Slow down." Tracey Schelin officially took an additional title of "trainer" and received a 50-cent-per-hour merit and length-of-service pay increase.

60. Both Jim Ripka and Joe Ripka believed that Ms. Schelin's production level was very good at the time she was terminated.

61. As a result of the sexual harassment and the termination of her job, Tracey Schelin suffered significant mental anguish and suffering as evidenced by her loss of pride and self-esteem, her sleep disturbances, her change in personality from a friendly, happy person to a difficult person to be around, her significant unusual weight gain, her

loss of caring about her personal appearance, her withdrawing from long-term relationships with friends and family, her loss of trust of others, her fears regarding work, her loss of self-confidence and independence, and her loss of ability to further her education at Brown Institute as she had planned.

62. Tracey Schelin was unemployed for six months. She diligently sought employment and did find employment at AD&P on March 7, 1994. PGI does not claim that Tracey Schelin failed to mitigate her damages and mitigation of damages is not an issue in the proceeding.

63. Ms. Schelin's period of unemployment was from September 3, 1993 to March 4, 1994, a total of 27 weeks. On March 7, 1994, Ms. Schelin started working for AD&P, where she was employed up to the start of the hearing on February 6, 1995, a total of approximately 48 weeks

64. Exhibits 12, 13 15 and 16 identify Ms. Schelin's wage loss. At the time Ms. Schelin was terminated from employment by PGI, her hourly wage rate was $11.25 per hour. Her average weekly wage, including overtime, was $483.68. Because Ms. Schelin was unemployed for 27 weeks, her wage loss during the period of unemployment totalled $13,059.36. Her average weekly earnings at AD&P is $402.93 for the first 39 weeks of this period. She received a promotion to bindery supervisor approximately two months before the hearing and received a wage increase of 50 cents an hour; her average weekly income increased to $425.32. Ms. Schelin had a 39-week wage loss of $3,149.25, plus a nine-week wage loss of $525.33. Combining her wage loss for the 27 weeks she was unemployed with her wage loss due to the salary differential between her earnings at PGI and AD&P, her total economic loss amounts to $16,733.94 through the date of the hearing.

65. Ms. Schelin continues to sustain a wage loss because her wage rate is less at AD&P. At the time she was terminated, her average weekly wage rate at PGI was $483.68, her average weekly wage rate at her new job is $425.32, a difference of approximately $59.00 per week. Ex. 15. This amount ($59) is a conservative figure because it assumes, contrary to the trend of evidence, that Ms. Schelin would not have gotten a wage rate increase through three performance appraisal periods at PGI.

66. The State of Minnesota provided Tracey Schelin $6,300.00 in unemployment compensation during her six months of unemployment.

67. Tracey Schelin suffered significant financial loss and stress, including a loss of income, and loss of opportunity to attend her scheduled two-year program at the Brown Institute, which tuition has increased over $1,400 just from 1993 to 1994, and continues to rise. Tracey Schelin suffered the loss of profit sharing and was economically forced to cash in her retirement 401K funds just to live on.

68. After being fired, Tracey Schelin could not afford to pay her medical COBRA continuation coverage. As a result, she could not afford to go to a physician when she broke her toe. Her toe has now healed crookedly and hurts when she stands on it.

69. Tracey Schelin was forced to borrow money from her boyfriend, her friends and her family during the six months she was unemployed. She now has large credit card balances which she did not have previously.

70. Tracey Schelin has incurred costs, expenses and attorney's fees in bringing her claims against PGI.

71. On January 5, 1994, Ms. Schelin filed a charge of discrimination with the Minnesota Department of Human Rights, alleging unlawful discrimination on the basis of sex, marital status and reprisal.

72. Because the Department of Human Rights had not issued a determination with respect to Ms. Schelin's charge of discrimination within 180 days from the filing of the charge, Ms. Schelin requested that a hearing be held before an Administrative Law Judge pursuant to Minn. Stat. § 363.071, subd. 1(a) (1994). On August 25, 1994, a Notice of and Order for Hearing was issued in this matter.

73. The parties waived the requirement set forth in Minn. Stat. § 363.071, subd. 2 (1994) for personal service on the Respondent and service by registered or certified mail on the Complainant.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has authority to consider the issues raised by the Complainant's discrimination charges under Minn. Stat. §§ 363.071, subds. 1a and 2 and 14.50 (1994).

2. The Notice of and Order for Hearing was proper as to form, content and execution, and all other relevant substantive and procedural requirements of law or rule have been satisfied.

3. Respondent PGI, Inc. is an "employer" within the meaning of Minn. Stat. § 363.01, subd. 17 (1994), and Tracey Schelin, the Charging Party, was an "employee" within the meaning of Minn. Stat. § 363.01, subd. 16 (1994).

4. The Minnesota Human Rights Act prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions or privileges of employment because of sex. Minn. Stat. § 363.03, subd. 1(2) (1994).

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that Respondent PGI, Inc. committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03, subd. 1.

6. Pursuant to Minn. Stat. § 363.01, subd. 14 (1994), discrimination based on sex includes sexual harassment. "Sexual harassment" is defined to include:

> . . . Unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when
>
> . . .
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or

> creating an intimidating, hostile or offensive . . . environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action. Minn. Stat. § 363.01, subd. 41 (1994).

7. Complainant established that she was the victim of unwelcome "verbal or physical conduct or communication of a sexual nature" which substantially interfered with her employment and created an intimidating, hostile and offensive working environment for purposes of Minn. Stat. § 363.01, subd. 41 (1994).

8. PGI engaged in unfair discriminatory practices in violation of the Minnesota Human Rights Act by failing to take timely and appropriate action upon being informed by Complainant that co-workers were calling her names and directing sexually derogatory comments toward her. PGI, Inc. had actual notice of the harassment. Because PGI, Inc. failed to take timely and appropriate action to stop co-worker sexual harassment of Complainant, PGI, Inc. is liable for the sexual harassment.

9. Under Minn. Stat. § 363.03, subd. 7(1), it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person opposing unfair discriminatory practices under the Minnesota Human Rights Act.

10. Respondent PGI, Inc. engaged in unlawful reprisal against Complainant by making rules that only applied to her, by not preventing the ongoing sexual harassment, treating her as a liability to the Company, and summarily discharging her without warning or explanation.

11. Ms. Schelin has failed to properly present an argument of disparate treatment based on marital status within the guidelines of McDonnell-Douglas Corp. v. Green.

12. Minn. Stat. § 363.071, subd. 2 (1994), permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Ms. Schelin is entitled to compensatory damages in the amount of $50,201.82, which is three times the amount of the wages she would have earned had the Respondent not discriminated against her.

13. Under Minn. Stat. § 363.071, subd. 2 (1994), victims of discrimination are entitled to compensation for mental anguish and suffering from discriminatory practices. In this case, Ms. Schelin suffered mental anguish and suffering as a result of Respondent's discriminatory conduct and is entitled to compensation for mental anguish and suffering she has sustained in the amount of $100,000.00.

14. Under Minn. Stat. §363.071, subd. 2, the standards set forth in Minn. Stat. § 549.20 (1994), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. In this case the Complainant is entitled to punitive damages in the amount of $8,500.00.

15. Minn. Stat. § 363.071, subd. 2, requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was

intentional, the Respondent should pay a civil penalty to the State in the amount of $100,000.00.

16. Minn. Stat. § 363.071 authorizes the Administrative Law Judge to order Respondent to pay Ms. Schelin's reasonable attorney's fees. Attorney's fees will be awarded in this case upon submission of the fees and costs incurred by Complainant's attorney.

17. Minn. Stat. § 363.071, subd. 7 requires the award of litigation and hearing costs of the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. Litigation and hearing costs will be awarded upon submission of the costs incurred by the Department of Human Rights.

18. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. Respondent shall cease and desist from any further sexual harassment and any other unfair discriminatory practices as set forth herein. All persons employed by Respondent in a management or supervisory capacity shall receive appropriate training with respect to sexual harassment and employment discrimination based on sex.

2. Respondent shall immediately change the termination status of Tracey Schelin to a voluntary quit, and shall provide appropriate, nondefamatory and positive job references to all future inquiries regarding Tracey Schelin.

3. The Respondent's unfair discriminatory practices shall be certified to all licensing and regulatory agencies and to all public contract letting agencies pursuant to Minn. Stat. § 363.071, subd. 4 and subd. 5.

4. Respondent shall pay total damages to Tracey Schelin in the amount of $158,701.82, calculated as follows:

Compensatory damages in the amount of lost wages tripled	$ 50,201.82
Damages for mental anguish and suffering	100,000.00
Punitive damages	8,500.00
Total	$ 158,701.82

5. Respondent shall pay to Ms. Schelin pre-judgment interest on her wage loss damages in the amount of $16,733.94, to start accruing from August 27, 1993 and continuing until paid in full.

6. Respondent shall pay a civil penalty to the state by filing a payment with the Commissioner of Human Rights (check made payable to the State Treasurer, General Fund) in the amount of $100,000.00.

7. Tracey Schelin is awarded judgment against PGI Companies, Inc. for all of her reasonable costs, expenses and attorney's fees pursuant to Minn. Stat. § 363.071, subd. 2, which costs and expenses shall be submitted to the Administrative Law Judge within 10 days of the date of this Order and a copy served upon Respondent. Respondent shall have five working days to file comments, if any.

8. PGI Companies is hereby ordered to reimburse the Minnesota Department of Human Rights its litigation and hearing costs pursuant to Minn. Stat. § 363.071, subd. 7, which costs and expenses shall be submitted to the Administrative Law Judge within ten days of the date of this Order, and a copy served upon Respondent. Respondent shall have five working days to file comments, if any.

Dated this _____ day of June, 1995.

ALLEN E. GILES
Administrative Law Judge

Reported: Taped (13 cassette tapes constitute the record of testimony in this proceeding).

MEMORANDUM

Sexual Harassment

Complainant alleges that Respondent PGI violated the Minnesota Human Rights Act ("MHRA") by failing to take prompt and appropriate action to remedy the sexual harassment she received from co-workers. Respondent does not deny that Complainant was subjected to sexual harassment by co-workers. Respondent asserts that it responded promptly and appropriately to all complaints and for that reason it should not be held liable for the sexual harassment.

The MHRA provides that, "[e]xcept when based on a bona fide occupational qualification, it is an unfair employment practice . . [f]or an employer, because of . . . sex, . . . to discharge an employee; or to discriminate against an employee with respect

to . . . terms, . . conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2)(b) and (c) (1994). Discrimination based on sex is defined to include sexual harassment. Sexual harassment, in turn, is defined to include "verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment," and "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. § 363.01, subd. 10a (1994).

Minnesota courts have determined that discrimination charges arising under the MHRA must be analyzed in accordance with a method of analysis first set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) for use in cases arising under Title VII of the Federal Civil Rights Act of 1964. See,. e.g., Danz v. Jones, 263 N.W. 2d 395, 399 (Minn. 1978); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986). This approach consists of a three-part analysis which first requires a complainant to establish a prima facie case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against complainant. The burden of producing evidence then shifts to respondent who is required to articulate a legitimate, non-discriminatory reason for its treatment of the complainant. If respondent establishes a legitimate, non-discriminatory reason, the burden of production reverts to complainant to demonstrate that respondent's claimed reasons are pretextual. Anderson v. Hunter, Keith, Marshall and Co., 417 N.W.2d 619, 613 (Minn. 1989). The burden of proof remains at all times with complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W. 2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of sexual harassment is established by showing that:

(1) The employee is a member of a protected class;

(2) The employee was subjected to unwelcome sexual harassment;

(3) The harassment complained of was based on sex;

(4) The harassment affected a term, condition, or privilege of employment or created an intimidating, hostile, or offensive working environment; and

(5) The employer is liable for the harassment that occurred based on its actual or imputed knowledge of the harassment and its failure to take appropriate remedial action.

Johnson v. Ramsey County, 424 N.W.2d 800, 808 (Minn. Ct. App. 1988); Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986).

Complainant established a prima facie case of sexual harassment. Ms. Schelin is a member of a protected class. She received unwelcome sexual harassment from her co-workers. The harassment consisted of sexually derogatory comments directed at her personally or spoken in her presence. The harassment created an intimidating, hostile or offensive working environment for her. The offensive verbal conduct of Ms. Schelin's co-workers constitutes actional sexual harassment.

Complainant also accomplished her ultimate burden persuasion: that PGI had actual or imputed knowledge of the harassment but failed to take appropriate remedial action. Ms. Schelin complained about the co-workers' sexual harassment to PGI management personnel on several occasions. She complained first to Plant Manager Joe Ripka in August or September 1992. Joe Ripka conferred with Vice-President Jim Ripka and decided to give verbal warnings to Dale Gueningsman and Rick Sieverson. Joe Ripka testified that he told both employees to "knock it off". The verbal warning did not end the sexual harassment. Near the end of December 1992, Ms. Schelin made a second sexual harassment complaint to PGI management when she complained to PGI President Jeffory Brower. About one month later, co-workers who harassed her were disciplined. However, her complaint to Mr. Brower and the adverse disciplinary actions did not end the sexual harassment. The day following her December complaint to Mr. Brower, many employees knew that she had complained about sexual harassment. Ironically, the complaint to Mr. Brower triggered a new way for co-workers to harass Ms. Schelin. They would use derogatory sexual language, not directed at Ms. Schelin personally, but intentionally spoken loud enough for her to hear. On April 6, 1993, Ms. Schelin received the letter from a co-worker requesting sex which on the same day she gave to her supervisor, Kathy Flood-Bergeson. Approximately one week later, she met with Mr. Brower and Mr. Woll who informed her that they would take care of it. At no time subsequent to Ms. Schelin's sexual harassment complaints did anyone from PGI management confer with her about whether her co-workers continued to sexually harass her.

Under Minnesota law, an employer is liable for sexual harassment if the employer "knows or should know of the existence of the harassment and fails to take timely and appropriate action." Minn. Stat. § 363.01, subd. 10a(3). Prior to the Minnesota Legislature adopting the above language, the Minnesota Supreme Court had decided in Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980) that sex discrimination includes sexual harassment which affects conditions of employment when the employer knows or should have known of the employee's conduct and fails to take timely and appropriate action. An employer may avoid liability for acts of sexual harassment committed by a co-worker if it shows that it took "timely appropriate, remedial action." Tretter v. Liquipak International, Inc., 356 N.W.2d 713, 715 (Minn. Ct. App. 1984). Such action "may include dessimination of an anti-harassment policy, transferring the employee to another shift, or taking or threatening disciplinary action against offending employees." Id. at 715-16, citing McNabb v. Cub Foods, 352 N.W.2d

378, 384 (Minn. 1984). The Tretter court emphasized that "[a]n employer must take strong, swift action to separate itself from the harassment of the offending supervisor." 356 N.W.2d at 716.

It is generally held that employers must undertake a reasonable investigation to obtain the truth and take disciplinary action that is in line with the severity of the harassment. Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989); Swentek v. U.S. Air, 830 F.2d 552 (4th Cir. 1987). The remedial measures taken to correct harassment must be prompt and reasonably calculated to end the harassment. See, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). Employers are obligated to impose more severe disciplinary measures if lesser disciplinary measures do not succeed at stopping the harassment. Intlekofer v. Turnage, 973 F.2d 773, 780 (9th Cir. 1992). Employers must take action within hours or days; waiting several weeks before acting has been held to be too long. Bennett v. New York City Department of Corrections, 705 F. Supp. 979 (S.D.N.Y. 1989).

PGI claims that it acted reasonably and promptly to remedy Ms. Schelin's sexual harassment complaints. There is no support in this record for this assertion. PGI failed to respond promptly and appropriately to any of Ms. Schelin's complaints of sexual harassment. Even the complaint involving Shane Anderson took over a week and Ms. Schelin received no follow-up. The Company's responses were inadequate to prevent the continuation of the sexual harassment and not "reasonably calculated to end the harassment." The Company's response to Ms. Schelin's complaints, particularly the threat on her life by Dale Gueningsman, showed a callous and reckless disregard for her safety. PGI is liable for the sexual harassment of Ms. Schelin by her co-workers.

The record establishes that Ms. Schelin was subject to sexual harassment from co-workers beginning in August 1992 until she was terminated on August 27, 1993. PGI does not deny or challenge that co-workers sexually harassed Ms. Schelin up until the date of her termination; rather, the Company asserts that Ms. Schelin never returned after the April 7 incident to file another complaint of sexual harassment. However, Ms. Schelin is under no obligation after having filed three sexual harassment complaints with management to continue filing such complaints. PGI had actual notice of the harassment. As the Minnesota Supreme Court noted in McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984), the victim of sexual harassment "[is] not required to formally complain of sexual harassment of which the employer has knowledge." Similarly, the Court of Appeals determined in Bersie v. Zycad Corp., 417 N.W.2d 288, 291 (Minn. Ct. App. 1987), that employer liability for harassment may be created through either actual knowledge of incidents or the fact that incidents were so obvious or pervasive that the employer should have known of the misconduct. Ms. Schelin also had no duty to report continuing incidences of harassment and/or reprisals when PGI clearly indicated its indifference to her when she made her other complaints. Employees are not required to complain to the employer of sexual harassment where the person to whom the report should be made is the harasser or has demonstrated a lack of concern. Jensen v. Eveleth Taconite Company, 824 F. Supp. 847 (D. Minn.

1993). PGI is liable for sexual harssment of Ms. Schelin for the period August 1992 to August 27, 1993, approximately one year.

Reprisals

Ms. Schelin argues that beginning in May 1993 and continuing until her termination, PGI, its management and employees, engaged in a series of reprisals which continued the intimidating hostile work environment for Ms. Schelin in violation of Minn. Stat. § 363.03, subd. 7. Subdivision 7 provides in relevant part as follows:

> It is an unfair discriminatory practice for any employer . . . to intentionally engage in any reprisal against any person because that person:
>
> (1) opposed a practice forbidden under this chapter . . .
>
> A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refused to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . .

The McDonnell Douglas burden-shifting scheme for analyzing discrimination claims applies to claims of reprisal or retaliation. Hubbard v. United Press Intern. Inc., 330 N.W.2d 428, 444 (Minn. 1983). Ms. Schelin has the initial burden of establishing a prima facie case of reprisal or retaliatory discharge. To establish a prima facie case of retaliation, an employee must establish:

> (1) statutorily-protected conduct by the employee;
>
> (2) adverse employment action by the employer; and
>
> (3) a causal connection between the two.

Once the prima facie case is established, the burden of production shifts to PGI to show some legitimate, nondiscriminatory reason for the reprisals and retaliatory discharge. If PGI meets this burden, Ms. Schelin has the opportunity to show that PGI's presumptively valid reasons are in fact a pretext for obscuring discrimination. Hubbard v. United Press Intern. Inc. at 444-45 and Giuliani v. Stuart Corp., 512 N.W.2d 589, 593-94.

By filing complaints with PGI, Ms. Schelin attempted to eliminate hostile working conditions caused by co-workers' sexual harassment. After filing the complaints, PGI,

primarily Joe and Jim Ripka, viewed Ms. Schelin as a "liability" to the Company. Joe Ripka communicated to certain PGI employees that Ms. Schelin was a liability to the Company when he told them to "watch" Ms. Schelin. Ms. Schelin asserts that PGI launched a campaign of reprisals against her because she opposed sexual harassment and because she began dating Ron Schliesman. Ms. Schelin asserts that a series of reprisals continued the hostile working conditions. These incidences included the following:

> Shortly after Tracey Schelin and Ron Schliesman began dating in May 1993, Ron's brother, who was a Pressman Assistant, was terminated from his employment at PGI with no reason given to him for the termination.
>
> Tracey Schelin was accused by Shop Supervisor Joe Ripka of "bothering pressmen" on the second shift when Tracey Schelin wasn't on the employer's premises. Tracey Schelin, by Joe Ripka's own admission, was not given a chance to provide evidence that the accusation was false.
>
> Tracey Schelin was forbidden by Shop Supervisor Joe Ripka from taking breaks and lunches with Ron Schiesman, even though all other employees were allowed to do so, including other employees who were dating.
>
> Joe Ripka and Vice-President Jim Ripka banned only Tracey Schelin, and no other employees, from PGI's building and parking lot when she was not working. As Joe Ripka testified, this was to prevent her from meeting her boyfriend in the parking lot after he got done with his shift.
>
> PGI allowed co-workers to continue to talk in the same derogatory terms, although not directed directly at Tracey, but intentionally loud enough for her to hear. PGI allowed Tracey Schelin to be shunned, isolated and ostracized by co-workers who continued to call her names such as "narc" and "tattletale". PGI also promoted the worst harasser, Dale Gueningsman, to be Ms. Schelin's supervisor.
>
> PGI President Jeffrey Brower refused to let Tracey Schelin see her personnel file.
>
> Soon after Tracey Schelin moved to the second shift on August 9, 1993, Joe Ripka had a recently hired employee with no previous experience working in the bindery "watch" Tracey Schelin and report to him on Ms. Schelin's actions.

> Joe Ripka used the report by the part-time employee as "proof" of Ms. Schelin's actions when there was a reasonable basis for concluding that the report contained inaccuracies. Joe Ripka and PGI should have known that the report was inaccurate because it directly contradicted the written report of the same incident by another employee. Both Tracey Schelin and Ron Schliesman testified that the report was false in other respects.
>
> PGI accused Tracey Schelin of talking to her boyfriend, Ron Schliesman, on the job when all other employees were allowed to speak to each other.
>
> PGI accused Tracey Schelin of making popcorn and eating it on her shift, when PGI's witnesses admitted that this conduct was permitted and most other employees did it.
>
> PGI accused Tracey Schelin of refusing to work when she spent a few minutes after her lunch break finishing an ice cream dessert.
>
> PGI promoted an employee on the second shift to be supervisor (Marnie Simpson) when Tracey Schelin had vastly more experience, expertise and longevity with the Company and in the printing business.
>
> PGI terminated Tracey Schelin without warning on August 27, 1993 and PGI Vice-President Jim Ripka refused to give her the reasons for her termination even though she asked several times.

All these incidences taken together illustrate the course of conduct which continued an extremely hostile work environment for Tracey Schelin. Based on the above incidences, Ms. Schelin has established a prima facie of reprisal by PGI. As the court stated in Giuliani:

> While the incidents examined individually might seem inconsequential, in the aggregate they illustrate a course of conduct creating a hostile environment. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-05, 91 L.Ed.2d 49 (1986); Continental Can Co. Inc. v. State, 297 N.W.2d 241, 248-49 (Minn. 1980) (sexual harassment ncludes such conduct having the effect of unreasonably interfering with an individuals' work performance or creating an intimidating, hostile or offensive working environment); Harris v. Forklift Sys., ___ U.S. ___, 114 S. Ct. 367, 371, 126

L.Ed.2d 295 (1993). All circumstances must be examined in hostile work environment cases brought under Title VII.

Giuliani v. Stuart Corp. at 594.

PGI admits to the occurrence of the retaliatory activities identified above. In an effort to provide reasons that justify the retaliatory activities, PGI produced a number of witnesses who gave conflicting testimony. Based upon the demeanor of these witnesses as they testified before President Brower and Vice-President Jim Ripka, and considering the inconsistencies in their testimony, the Judge finds their testimony not credible. The Judge also finds that testimony provided by Joe Ripka and Jim Ripka regarding these retaliatory activities conflicting and not credible. For example, on a basic question such as: what company personnel were involved in the decision to terminate Tracey Schelin, and when was the decision made, several answers were different. Joe Ripka testified that he and Jim Ripka decided to terminate Tracey Schelin based upon the reports made to him and to Jim Ripka near the end of Tracey Schelin's second week (Thursday or Friday) on the second shift. Jim Ripka, on the other hand, testified that only he and Marnie Simpson, Ms. Schelin's supervisor, were involved in the decision to terminate Ms. Schelin, which decision was made Tuesday or Wednesday of the third week. Marnie Simpson, having been off work the entire second week, testified that she was not involved in the decision to terminate Ms. Schelin. She testified that she was informed that Ms. Schelin was going to be fired when she returned. After being so informed, she told Jim Ripka that she had "problems" with Ms. Schelin. Cf. Interrogatory Answer 7.

Another example of the conflicting testimony relates to the reasons given for Ms. Schelin's termination. Both Joe Ripka and Vice-President Jim Ripka testified that she was terminated because of conduct other than her production on the job. However, Tracey Schelin's supervisor, Marnie Simpson, testified that as long as Tracey Schelin's production stayed up, she allowed Tracey to do whatever she wanted to do on the shift. Marnie Simpson testified that Tracey Schelin's production was down and that is why she didn't want to be Tracey's supervisor. However, she also testified that she had the ability to keep records regarding production but had no such records. Both Joe Ripka and Jim Ripka testified that Tracey Schelin's production was very good, remained good and never went down. Contrary to Ms. Simpson's testimony, they both said that Ms. Schelin's production was not an issue in her termination.

Vice-President Jim Ripka testified that he fired Tracey Schelin because (1) her supervisor said she had "problems" with Tracey Schelin and said she would quit if she had to supervise Tracey Schelin, and (2) because of an incident where she ate ice cream when she was supposed to be working. These reasons do not stand up to close scrutiny. First, the supervisor, Marnie Simpson (who had only worked at PGI for about one year), testified that the first week that Tracey worked for her was fine and that she (the supervisor) had been sick the entire second week. Marnie Simpson never even said anything to Tracey about her work or her conduct at the job other than one side comment of, "Let's get it together". There was little other discussion. Marnie Simpson

did not give Tracey Schelin any disciplinary action such as a verbal warning, written warning or a suspension. Marnie Simpson's testimony about her "problems" with Ms. Schelin lack credibility. She first testified that the first week or so that Tracey Schelin worked for her was absolutely no problem. She then testified that she was out sick the entire next week. Vice-President Jim Ripka said he made his decision to terminate Tracey on Tuesday of the following week. Therefore, Marnie Simpson had only two days in which to have any concerns about Tracey Schelin. Finally, contrary to Jim Ripka's testimony that Ms. Schelin was fired because of Ms. Simpson's threat to quit, Ms. Simpson testified that the decision to terminate Ms. Schelin had already been made when she met with Jim Ripka.

The Judge does not believe that PGI met its burden of advancing legitimate business reasons for the reprisals that it took against Ms. Schelin. The reasons PGI did advance for some of the reprisals are not credible. The reasons advanced, for example, for the firing of Ms. Schelin are not even consistent between PGI's own witnesses.

Assuming that PGI has met its burden of advancing legitimate non-discriminatory reasons for the retaliatory actions taken against Ms. Schelin, there is ample evidence to suggest that those reasons are a pretext for discrimination. The reasons given for Ms. Schelin's termination are a pretext because:

1. Ms. Schelin never got an opportunity to challenge the "reports" to state her view; PGI knew or should have known that the view of various events were in conflict.

2. Even if the reasons given for Ms. Schelin's termination are true, they amount to minor infractions unsuitable for terminating a person with the longevity of employment of Ms. Schelin.

3. PGI chose not to use the Company's progressive discipline policy by summary termination of Ms. Schelin. Other employees, particularly those who sexually harassed Ms. Schelin, were given verbal or written warnings.

4. Ms. Schelin's work performance, including her production on the job, was not an issue.

The reasons offered by PGI for the continuing discrimination and reprisal are pretextual. Ms. Schelin's performance evaluations and merit increases for the last year prior to her termination are extremely positive. The last one was two months before her termination, and she not only received a merit increase, but an increase in title and duties.

<u>Marital Status Discrimination</u>

Minn. Stat. § 363.03, subd. 1(2) also prohibits discrimination in employment based upon marital status. Marital status is defined at Minn. Stat. § 363.01, subd. 24 (1994) as follows:

> "Marital status" means whether a person is single, married, remarried, divorced, separated, or a surviving spouse and, in employment cases, includes protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse.

Ms. Schelin argues that PGI, principally Jim and Joe Ripka, took discriminatory actions against her because of her identity as the former spouse of their nephew, Bobby Ripka. Because Ms. Schelin is alleging disparate treatment, the McDonnell-Douglas Corp. v. Green analysis must be used to determine whether or not discrimination has occurred. Under the McDonnell-Douglas Corp. v. Green method of analysis, Ms. Schelin must first establish a prima facie case of disparate treatment based upon a statutorily prohibited discriminatory factor.

The Judge notes that Ms. Schelin has provided no argument framing the marital status discrimination claim within the McDonnell Douglas v. Green method of analysis. Because of the lack of argument on this issue, the Judge is unclear what evidence would be needed to establish a prima facie case. The Judge nevertheless notes that there is strong affirmative evidence in the record establishing that Joe and Jim Ripka did not want Ms. Schelin dating Ron Schliesman. The record reflects that Jim and Joe Ripka had work rules that applied to Ms. Schelin only. The Judge has already determined that PGI has failed to articulate legitimate nondiscriminatory reasons that are not pretext for the differential treatment of Ms. Schelin.

Considering all of the above, the Judge has determined that Ms. Schelin has failed to properly argue disparate treatment based upon marital status. The reason for this conclusion is that Ms. Schelin has failed to present an analysis of what is necessary to establish a prima facie case of marital status discrimination.

Affirmative Relief

Minn. Stat. § 363.071, subd. 2 (1994), authorizes the Administrative Law Judge to order affirmative relief to effectuate the purposes of the MHRA. In this case, the Judge has required PGI to cease and desist from any further sexual harassment and any other unfair discriminatory practices set forth in this Report and to require that management and supervisory level employees receive appropriate training with respect to sexual harassment and employment discrimination based on sex.

Compensatory Damages

Minn. Stat. § 363.071, subd. 2 (1994), authorizes an award of compensatory damages to the victims of unfair discrimination practices. The general purpose of the compensatory damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626 (Minn. 1988); Brotherhood of Railway and Steamship Clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975).

Ms. Schelin's compensatory lost wages amount to $16,733.94. However, the Judge finds that awarding her this amount will not adequately compensate for losses she has incurred. Her actual loss has been trebled for the following reasons:

To make Ms. Schelin whole would require that she be fully reinstated in her previous position at PGI at a salary that she would be currently earning and reinstating all benefits of her ten years longevity with PGI. For obvious reasons, reinstatement is not an option in this case. The Judge has concluded that Ms. Schelin's estimated average wage loss should be trebled for the following reasons:

Ms. Schelin is surrendering a right to reinstatement. She is also surrendering a right to current salary at PGI which could be, after three performance appraisal periods, as much as an additional $1.50 per hour, which would make her current hourly wage $12.75. That hourly wage is $3.25 more per hour than what Ms. Schelin receives in her current employment. Comparing her average weekly wage that she would be earning at PGI ($12.75 per hour regular time, and $19.13 per hour overtime), her average weekly wage at PGI if she were still employed there would be approximately $570.82. Comparing that wage to the wage of her average weekly wage at her current employment, $425.32, results in an average weekly wage loss of $155.50. Ms. Schelin has an ongoing wage loss potential of $8,086 on an annual basis, $155.50 times 52 equals $8,086. Ms. Schelin's wage losses would triple in approximately six years. Even if you use Ms. Schelin's ongoing salary differential as previously conservatively estimated at $59 per week, using that salary differential would result in more than doubling her losses in approximately six years. In addition to these wage losses, Ms. Schelin suffered other losses that may have a long-term impact on her future. She lost her profit sharing monies when she was forced to cash in her 401K funds for current living expenses. She has lost the opportunity to attend Brown Institute to advance her career and her attendance at that school is placed on hold.

Ms. Schelin's lost wages have not been offset by the $6,300 she received in unemployment compensation. Unemployment compensation is an economic security benefit paid by the State of Minnesota to aid workers who have been separated from employment. Unemployment compensation provides economic security to workers during a period of financial stress. The purpose of this program is not to reduce the financial liability of employers who have committed unfair discriminatory practices. The rule in Minnesota regarding the set-off of unemployment compensation benefits from damage awards for unjust termination is found in Bang v. International Sisal Co., 212 Minn. 135, 4 N.W.2d 113 (Minn. 1942). Bang held that:

> Nor can funds received by plaintiff during the contract year from the state unemployment compensation fund (Mason St. 1940 Supp. ¶ 4337-21, et seq.) on account of his unemployment be regarded as compensation received from other employment so as to be deductible in mitigation of damages. The benefits received were intended to alleviate the distress of unemployment (¶ 4337-21), not to diminish the amount which an employer must pay as damages in making whole a wrongfully discharged employee.

4 N.W.2d at 116. Similarly, the court, in Gaworski v. ITT Commercial Finance Corp., 92-1753, 17 F.2d 1108 (8th Cir. 1994), held that unemployment compensation does not constitute a set-off for an award of back pay in a discrimination case. For these reasons, the Judge does not believe it is appropriate to reduce PGI's liability by this economic security benefit.

The Judge also finds that prejudgment interest on Ms. Schelin's wage loss of $16,733.94 is appropriate.

Damages for Mental Anguish and Suffering

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to award damages for mental anguish and suffering. Ms. Schelin suffered life-changing mental anguish dealing with the sexual harassment in her day-to-day work situation, and the reprisals and uncertainties from day to day at her employment.

While being subjected to sexual harassment for approximately one year, Ms. Schelin experienced humiliation, embarrassment, worry, fear and isolation. She did not herself use the crude, derogatory language of her harassers. Hearing such language embarrassed her and having such language directed at her personally humiliated her and led her to think that she was a "bad" person whose behaviors or conduct was the cause for the verbal assault she was experiencing. Her confidence and self-esteem plummeted and it was uncomfortable for her to be at work. She expressed fear and was in tears when she went to Mr. Brower's office to inform him about the threat on her life made by Dale Gueningsman. Even after her complaint to Mr. Brower, co-workers continued to use derogatory terms in her presence and to refer to her as "narc" or "bitch". Ms. Schelin testified that the "harassment made me feel not like a real person anymore", that she became an object for their jokes -- she felt uncomfortable, tried to "tune it out" but could only do that to a degree. She wasn't taken seriously and "felt bad inside", "my self-esteem was going down". She didn't like coming to work anymore because she didn't like feeling the way she felt at work -- worthless and humiliated. Ms. Schelin recalled fears and uncertainties about what was happening to her and to her job at PGI with respect to the reprisals. The threats to fire her for non-work-related reasons, a refusal to allow her to see her personnel file, the summary termination without explanation, all combined to traumatize Ms. Schelin. She testified that "I didn't

believe like it was for real 'cause I had never dreamt of that ever happening." She "felt numb" because she had done nothing to deserve the summary dismissal.

She was suddenly separated from her source of income. Ms. Schelin testified that she "sees herself as an independent, self-sufficient person, not having to rely on anyone." However, this changed when she was terminated by PGI. She felt "bad", "horrible" and "depressed" that she could no longer meet her own financial obligations and had to rely on her boyfriend and her family to pay her bills. She borrowed from her boyfriend and her sister, further reducing her self-esteem. She accumulated large charge card obligations. She had to cash in her retirement. She was unable to afford her medical COBRA.

Ms. Schelin also experienced changes in her personal identity and personality as a result of the sexual harassment and termination by PGI. Witnesses testified that they observed such changes in Ms. Schelin. Before the sexual harassment she was a very happy, friendly woman who loved to talk with others. She maintained ongoing contact with her friends and family. She was described as a woman who was fun to be around. She cared about her personal appearance and kept her weight constant. She cared enough about her physical appearance and health to work with a personal trainer. She loved to curl her hair and put on makeup every day. She was a trusting person. However, as a result of the sexual harassment and reprisals, she began to sleep a lot more than she ever used to. She went from a woman who cared about what she looked like to a woman who did nothing with her hair, wore no makeup, and only wore baggy sweatpants. She withdrew from contact with her friends and family and became very isolated. She gained about 20 pounds. She became withdrawn, uncommunicative and difficult to be around. At one point after her termination, her "nerves" caused her to be so hot that she had to lay on the bathroom floor to try to cool off. She lost her self-esteem and trusting nature toward other people. Ms. Schelin has not regained these many and varied losses even today. Ms. Schelin had gone from a "bubbly", trusting person to a withdrawn, suspicious person. To friends and family, she has appeared distant and unconnected.

An award of damages for mental anguish in sexual harassment cases may be based on subjective testimony. The court stated that "recoverable pain and suffering does not have to be severe or accompanied by physical injury. Gillson v. State Department of Natural Resources, 492 N.W.2d 835, 842 (Minn. Ct. App. 1992). In Gillson, the Court of Appeals upheld a trial court's award of $100,000 for damages for mental anguish and suffering.

Based upon the subjective description of her worry and anguish, and the observations of witnesses of her mental anguish and suffering identified above, the Judge believes that a damage award for mental anguish and suffering should be $100,000.

Punitive Damages

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to award punitive damages to a victim of unfair discriminatory practices. The Judge is required to consider factors set out in Minn. Stat. § 549.20. Section 549.20, subd. 1 authorizes an award for punitive damages when there is "clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." PGI admits or does not deny that it knew that Ms. Schelin was subject to sexual harassment by co-workers. This record contains clear and convincing evidence that PGI failed to take remedial action calculated to resolve the hostile working environment. Over an approximate eight-month period, Ms. Schelin filed three complaints of sexual harassment and PGI nevertheless failed to take strong action to change the working environment. At no time did PGI follow up Ms. Schelin's complaints of sexual harassment to prevent retaliation or discipline whether the hostile working environment continued. PGI had advice from its attorney advising it to monitor a sexual harassment victims' work environment to guard against retaliation. Mr. Brower advised Ms. Schelin that the conduct she complained about was inappropriate and that retaliation would not be allowed, yet when she returned to him complaining about retaliation, he returned her to her work environment without monitoring or supervision. After Ms. Schelin complained about unlawful sexual harassment, she was viewed as a liability to the company and a series of reprisals were taken against her including her termination without warning or reason given. Based on the foregoing, the Judge concludes that PGI acted in deliberate disregard for the rights and safety of Ms. Schelin and that an award of punitive damages is appropriate in this case.

Minn. Stat. § 549.20, subd. 3 provides as follows:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Ms. Schelin suffered a hostile work environment for approximately one year. After informing Mr. Brower of the threat on her life because of her complaint about sexual harassment, Mr. Brower returned her to the hostile work environment without monitoring. The total conduct of PGI on the record of this proceeding and considering

that PGI is a successful company, after applying the relevant standards, the Judge concludes that a maximum award of punitive damages is appropriate.

Civil Penalty

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to assess a civil penalty against a respondent who has committed unfair discirminatory practices. That provision provides, in part, as follows:

> The Administrative Law Judge shall order any respondent found to be in violation of any provision of section 363.073 to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The Administrative Law Judge shall determine the amount of the civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. Any penalties imposed under this provision shall be paid into the general fund of the state.

Taking into account the seriousness of the violations, including the fact that PGI at no time took effective corrective action to correct the hostile working conditions, considering also that the violations were intentional in that PGI knew or should have known that sexual harassment was occurring and would continue to occur unless the company took strong action reasonably calculated to end the sexual harassment, the Judge believes that a civil penalty should be awarded in this case.

PGI does not deny that Ms. Schelin was subjected to sexual harassment from her co-workers. The Company's own investigation approximately five months after her initial report confirmed that co-workers subjected her to sexual harassment. After PGI management determined that Ms. Schelin was a victim of sexual harassment, it made no effort to monitor her work environment. Even when the person primarily responsible for the sexual harassment made a life-ending threat to Ms. Schelin, the Company made no effort to monitor her work environment. The Company failed to do this even after - being advised to do so by its attorney. The Judge believes that this conduct is irresponsible and that it is necessary to impose a civil penalty upon the Company commensurate with the recklessness of the conduct involved.

This record establishes that PGI is a successful company. The size the nature of the civil penalty is in the Judge's discretion. The Judge notes that in the Bradley v. Hubbard Broadcasting, et al., 471 N.W.2d 670 (Minn. App. 1991), a $200,000 civil

penalty was awarded against the defendant in that case. After consideration of all the above, the Judge has determined that a civil penalty of $100,000 is appropriate in this case.

Litigation and Hearing Costs

Minn. Stat. § 363.071, subd. 7 requires that the Administrative Law Judge order a respondent who has engaged in unfair discriminatory practices to reimburse the Minnesota Department of Human Rights for "all appropriate litigation and hearing costs expended." The Judge has directed the Department of Human Rights to supply an accounting of the litigation and hearing costs incurred by the Department in connection with this proceeding. Appropriate litigation and hearing costs will be awarded by the Judge.

Attorney's Fees

Minn. Stat. § 363.071, subd. 2 authorizes the Administrative Law Judge to make an award of attorney's fees. The Judge has directed counsel for Ms. Schelin to provide an accounting of attorney's fees and costs. In a subsequent order, the Judge will award appropriate and reasonable attorney's fees and costs.

AEG